IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE; TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

DEFENDANT SHERIFF WARREN'S RESPONSE TO PLAINTIFFS' APPLICATION FOR DEFAULT JUDGMENT AND PLAINTIFFS' MOTION TO STRIKE

COMES NOW, Defendant Sheriff David Warren ("Sheriff Warren") and respectfully requests that this Court deny Plaintiffs' Application for Default Judgment ("Application") and Plaintiffs' Motion to Strike and, as grounds therefore, states as follows:

1. Plaintiffs filed their Complaint on March 9, 2005 seeking injunctive relief and a declaratory judgment.

2. Plaintiffs issued the Summons and Complaint by certified mail addressed to Sheriff David Warren on March 10, 2006. (Plaintiffs' Motion to Strike ("Plaintiffs' Motion") at Ex. 3.)

3. According to the Return Receipt, Valerie Smith signed for the Summons and Complaint on Saturday, March 11, 2006. (Plaintiffs' Motion at Ex. 3.)

4. Sheriff David Warren has executed an affidavit stating how and when he was served with the Summons and Complaint. A copy of the affidavit is attached as

Exhibit 1.

5. Valerie Smith is a dispatcher employed at the Macon County Detention Facility. (Warren Aff. at ¶ 5). Valerie Smith is not a deputy and her duties do not include accepting service of process. (*Id.* at 6.) Upon information and belief, Valerie Smith signed for the envelope not knowing what she accepted receipt of. (*Id.* at ¶ 8.)

6. The Return of Service contains a section which must be completed on delivery. (Plaintiffs' Motion at Ex. 3.) That section contains a place for the signature and two boxes to indicate the capacity in which the mail is being accepted: either as the agent or as the addressee. (*Id.*) Valerie Smith did not indicate on the Return of Service that she is either the agent or the addressee for service of process on Sheriff Warren. (*Id.*)

7. Valerie Smith is not an agent or employee specifically authorized by Sheriff Warren to receive certified mail on his behalf nor is she authorized to accept service of process on behalf of Sheriff Warren. (Warren Aff. at ¶ 7.) Therefore, Plaintiffs failed to properly serve Sheriff Warren with the Summons and Complaint.

8. Sheriff Warren did not receive the Summons and Complaint until Monday, March 13, 2006, when it was delivered to his residence by an employee. (*Id.* at ¶¶ 1, 2.)

9. Sheriff Warren filed his Motion to Dismiss and Brief in Support of Motion to Dismiss on April 3, 2006 at 12:10pm CDT and 12:26 pm CDT respectively. (Plaintiffs' Motion at Ex. 4.)

10. Sheriff Warren timely filed his Motion to Dismiss and Brief in Support of Motion to Dismiss within 20 days from the date that he received the Summons and Complaint.

11. Plaintiffs filed their Motion to Strike at 4:49pm CDT on April 3, 2006 and the

Application for Default at 4:51pm CDT **after** Sheriff Warren filed his Motion to Dismiss and Brief in Support of Motion to Dismiss and one day after Plaintiffs contend Sheriff Warren's responsive pleadings were due.

12. Plaintiffs' Application for Default Judgment and Motion to Strike are due to be denied for several reasons.

13. First, Sheriff Warren asserts that his Motion to Dismiss was timely filed.

14. Second, even if this Court finds that Sheriff Warren's Motion was filed one day after his responsive pleading was due, Sheriff Warren cured any alleged default by filing his Motion to Dismiss **prior** to the Plaintiffs' Application for Default. *Hudson v. North Carolina*, 158 F.R.D. 78 (E.D.N.C. 1994)(concluding that "the lateness of the filing of the Rule 12 motion is irrelevant because the Defendants' motion was filed before the Plaintiff's Motion for Default Judgment." The court held that since the defendants filed their motion to dismiss prior to the time the plaintiff moved for default judgment, the defendants were no longer in default. The court further found that the filing of the motion to dismiss, however late, cured the defendants' default and thereafter entry of default would not be appropriate.).

15. Third, Plaintiffs have not argued and cannot show that the alleged one-day delay caused them to suffer any prejudice or harm. *Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986)(holding that the district court did not abuse its discretion when it denied a motion for default judgment. The Court noted that the defendant's answer was submitted on the same day as the plaintiff filed the motion for default judgment. The Court concluded that although the defendant failed to strictly comply with time requirements for filing of an answer, the plaintiff failed to show any prejudice as a result of the late filing.) *See also*,

Spurio v. Choice Security Sys., Inc., 880 F. Supp. 402 (E.D. Pa. 1995)(holding that default judgment was not warranted by defendant's 2-day delay in filing answer. The Court examined the facts in light of the Third Circuit's test for entry of default judgment and found that the 2-day delay did not prejudice the plaintiff, defendant had a meritorious defense, and delay did not rise the level of culpable conduct.); *Carwile v. Ray*, 481 F. Supp. 33 (E.D. Wa. 1979).

16. Finally, decisions based on the merits of an action are favored over judgments entered on procedural default. *Meehan v. Snow,* 652 F.2d 274, 277 (2d Cir.1981). Plaintiffs seek broad injunctive and declaratory relief in this case against Sheriff Warren. Plaintiffs have failed to state a claim in their Complaint and are not even entitled to the relief they seek. On the other hand, Sheriff Warren has presented a meritorious defense in his Motion to Dismiss and Brief in Support. Therefore, this case should be decided on its merits rather than a minor delay, which is strongly disputed, and which has caused no prejudice to the Plaintiffs. Consequently, Plaintiffs' Application for Default Judgment is due to be denied.

17. Also on April 3, 2006, Plaintiffs filed a Motion to Strike Sheriff Warren's Motion to Dismiss, Brief in Support of Motion to Dismiss, Response to Plaintiffs' Motion for Preliminary Injunction, and Response to Plaintiffs' Motion for the Commencement of Early Discovery. Plaintiffs' argue that they are entitled to have Sheriff Warren's Responses stricken pursuant to Rule 12(a) and (f) because they were not filed within 20 days after service of the Summons and Complaint.

18. Sheriff Warren contends, and the evidence shows, that Sheriff Warren filed his Motion to Dismiss, Brief, and Responses within 20 days after he received the Summons

and Complaint. Moreover, the 20-day requirement in Rule 12(a) by its plain terms only applies to an answer, responsive pleading, or motion to dismiss. Rule 12(a) does not apply to Sheriff Warren's Response to Request for Preliminary Injunction and Response to Request for Commencement of Early Discovery. Therefore, those Responses did not have to be filed within 20 days of the Sheriff receiving the Summons and Complaint. Accordingly, Plaintiffs' Motion to Strike is due to be denied.

WHEREFORE, the premises considered, Defendant Sheriff Warren moves this Honorable Court to deny the Plaintiffs' Application for Default Judgment and Motion to Strike.

Dated this 5th day of April, 2006.

Respectfully submitted,

/s/ Fred D. Gray
Fred D. Gray (GRA022)

/s/ Fred D. Gray, Jr.
Fred D. Gray, Jr. (GRA044)

Attorneys for Defendant,
David Warren, Sheriff of Macon County,
Alabama

OF COUNSEL:

GRAY, LANGFORD, SAPP, MCGOWAN,
GRAY & NATHANSON
P.O. Box 830239
Tuskegee, AL 36083-0239
334-727-4830 Telephone
334-727-5877 Facsimile
fgray@glsmgn.com
fgrayjr@glsmgn.com

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kenneth L. Thomas, Esq.
Ramadanah M. Salaam, Esq.
Gary A. Grasso, Esq.
Adam R. Bowers, Esq.

/s/ Fred D. Gray, Jr.
OF COUNSEL